Supreme Court, U.S.
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No. 00-1908

IN THE

Supreme Court of the United States

MORDECHAI GURARY,

Petitioner,

v.

UNITED DIAGNOSTIC, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Parties to the Proceeding (Rule 14.1(b))

The petition in part accurately lists the original parties to the proceedings below, but does not accurately list the parties as they exist today. Nu-Tech Bio-Med, Inc. no longer exists, and did not exist at the time of the proceedings and judgment in *Gurary v. Winehouse*, 235 F.3d 792 (2d Cir. 2000), from which the petition is taken. United Diagnostic, Inc., named as respondent in the caption of this brief in opposition, is the successor by corporate merger to Nu-Tech Bio-Med, Inc.

Additionally, the petition incorrectly identifies the petitioner. Mordechai Gurary, named as petitioner, was the plaintiff in the original action instituted in the district court. This petition involves only the imposition of sanctions on Gurary's counsel, pursuant to Fed. R. Civ. P. Rule 11(b) and Section 21D(c)(1) of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 *et seq.* Accordingly, Gurary no longer has any interest in this proceeding, and the correct petitioners are those counsel, David Jaroslawicz, Esq., and his law firm, Jaroslawicz & Jaros.

Corporate Disclosure Statement (Rule 29.6)

Respondent United Diagnostic, Inc. is a Delaware corporation whose securities are publicly-held but are not currently listed on any exchange. It has no publicly-owned corporate parents, subsidiaries, or affiliates. As noted in the foregoing Rule 14.1(b) Statement, United Diagnostic, Inc., is the successor-in-interest by corporate merger to one of the original defendants in the case, Nu-Tech Bio-Med, Inc.

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STATEMENT OF THE CASE

Respondent United Diagnostic, Inc. ("UDI"), successor to Nu-Tech Bio-Med, Inc. ("Nu-Tech"), submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit of petitioners David Jaroslawicz, Esq., and his law firm, Jaroslawicz & Jaros (hereinafter collectively, "Jaroslawicz").[1] Jaroslawicz seeks the writ to review a judgment of the circuit court (a) awarding UDI sanctions against him under Fed. R. Civ. P. 11(b) and under the sanctions provisions, 15 U.S.C. § 78u-4(c)(1)-(3), of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4 *et seq.*, and (b) remanding the case to the United States District Court for the Southern District of New York for determination of the amount of those sanctions. On remand, and while this petition was pending, the district court, by opinion and order dated August 1, 2001, awarded UDI sanctions against Jaroslawicz in the amount of $62,556.28.

Jaroslawicz's sole argument is that the court of appeals factually erred in imposing sanctions for frivolous securities law claims that Jaroslawicz now asserts were never lodged against UDI. The determination he challenges in this Court is thus

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[1] As noted in UDI's preceding Rule 14.1(b) Statement, the petitioner is incorrectly identified in the petition as Mordechai Gurary, who was the original plaintiff in the action in the district court.

factbound; he asks this Court to grant the writ to correct a purported factual error. Moreover, although he could have done so, Jaroslawicz failed to advance the argument he advances in this Court in two separate plenary appeals in the court of appeals.

The court of appeals' decision relied on settled principles of federal securities law, under case law and statute. Jaroslawicz's petition neither specifies nor even alludes to any conflict (much less an important one) between the decision of the court of appeals here and any decision of this Court, or between decisions of the circuit courts, that requires this Court's intervention. Similarly, the petition raises no serious and substantial question of federal law, or one relating to the administration of justice, that would mandate issuance of the writ. The petition should be denied.

A. The Facts.

Gurary alleged that he had made four open market purchases of the securities of UDI's predecessor Nu-Tech, each of which assertedly gave rise to claims under the securities laws against Nu-Tech and its co-defendants Isaac Winehouse and "Isaac Winehouse doing business as Wall & Broad Equities." (App. 68, 69) On his client's behalf, Jaroslawicz set forth two different theories of relief against Nu-Tech, either in the complaint or in defending the complaint against attack in the district court and in the court of appeals.

Common to both theories, Jaroslawicz alleged that the market for Nu-Tech's common stock, which was traded at the time on the NASDAQ exchange, was adversely affected by a "short selling" scheme in which defendants other than Nu-Tech had conspired to use Nu-

Tech's convertible securities to manipulate the market for its common stock. Both theories were predicated on the underlying fact that the Winehouse defendants were holders of Nu-Tech convertible preferred securities. These gave the Winehouse defendants the right to convert into Nu-Tech common stock and, according to Gurary, fueled these defendants' ability to profit by their short-selling scheme as it gave them "cheap stock" to "cover" their short sales. Because the conversion to common stock was made at a discount to market, the conversion formula effectively guaranteed a profit to the Winehouse defendants from their scheme, with no substantial risk.[2]

Jaroslawicz did not allege, however, that Nu-Tech was a direct or indirect participant in this scheme. Instead, in the complaint that he signed, Jaroslawicz posited that Nu-Tech was liable because it failed to disclose what it allegedly knew of the scheme. Later, in response to Nu-Tech's motion to dismiss, Jaroslawicz argued that Nu-Tech was liable because its president

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[2] "A short sale involves a seller agreeing to sell stock it does not own . . . ." *United States v. Russo*, 74 F.3d 1383, 1388 (2d Cir. 1996). *See also United States v. Manko*, 979 F.2d 900, 903 (2d Cir. 1992). If he is to profit, the seller must "cover" at a price lower than the sale price; that is, he must buy stock at a price lower than the short sale price to satisfy the short sale by making delivery on the contract to sell. *See* DICTIONARY OF FINANCE AND INVESTMENT TERMS 82 (2d ed. 1987). Gurary's theory was that the Winehouse defendants engaged in manipulative short selling, and then "covered" with common stock obtained through discounted conversions.

allegedly promised to frustrate the scheme, and did not. Based on these two theories, Gurary sought to recover for the decline in the value of the securities he had purchased on four separate occasions, from October 31, 1996, through February 18, 1997. (App. 71 ¶ 13; App. 79-80 ¶¶ 47-52)

B. Course of Proceedings Below.

Mordechai Gurary filed the original action on May 23, 1997, in the United States District Court for the Southern District of New York. His complaint (App. 68), signed by Jaroslawicz pursuant to Fed. R. Civ. P. 11(a), alleged violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, as well as violation of New York statutory law. The district court granted summary judgment to defendants, and dismissed the complaint (App. 1-8), and Jaroslawicz filed a notice of appeal on behalf of his client to the United States Court of Appeals for the Second Circuit. The district court also denied sanctions to UDI under Rule 11 and the PSLRA, and UDI filed a notice of cross-appeal.

By written opinion dated August 24, 1999, the court of appeals affirmed the district court's dismissal of the complaint, and reversed the denial of sanctions, holding that the district court had failed to make the sanctions findings mandated by 15 U.S.C. § 78u-4(c)(2). *Gurary v. Winehouse*, 190 F.3d 37 (2d Cir. 1999) ("*Gurary I*") (App. 9-34). Because the district court had failed to comply with the statutory mandate, the court of appeals remanded so that the district court could make such findings in the first instance. On remand, the district

court once again denied sanctions, this time rendering written findings of fact and conclusions of law. (App. 35-38) UDI filed a second notice of appeal to the United States Court of Appeals for the Second Circuit.

The second appeal was limited to the issue of sanctions, and UDI was successful in obtaining a direction for the imposition of sanctions. By published opinion dated December 19, 2000, the court of appeals held that of the four securities trades that Jaroslawicz on his client's behalf had specified as the basis for the claims, two were insupportable in law and in fact, and thus violated Fed. R. Civ. P. 11(b). The court of appeals remanded for the determination of the amount of the sanctions. *Gurary v. Winehouse*, 235 F.3d 792 (2d Cir. 2000) ("*Gurary II*") (App. 39-65). While the petition in this Court was pending, on August 1, 2001, the district court imposed sanctions on Jaroslawicz in the amount of $62,556.28. *Gurary v. Winehouse*, 97 Civ. 3803 (LLS), 2001 WL 876912 (S.D.N.Y. Aug. 2, 2001). Jaroslawicz did not seek a stay of the mandate of the court of appeals in *Gurary II*, either here or in that court.

Jaroslawicz timely moved for rehearing and rehearing *en banc* before the court of appeals, and that court denied the motion. (App. 66-67) Jaroslawicz filed his petition for a writ of certiorari on May 29, 2001, and it was placed on the docket on June 21, 2001. UDI's date to respond was extended by the Clerk of the Court to August 20, 2001. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1).

C. The Decision of the Court of Appeals in *Gurary I*.

The court of appeals in *Gurary I* affirmed the dismissal of the federal securities law claims predicated on Gurary's purchases of Nu-Tech securities. The court began by noting that the one contention which Gurary had continued to press on appeal as against Nu-Tech was that he was:

> deceived in making his December 24, 1996 and February 18, 1997 purchases because he relied upon Feigenbaum's [Nu-Tech's president] declarations that Nu-Tech would not register the common [stock] into which the Winehouse group's [the other defendants and their alleged co-conspirators] preferred was convertible and that this should or would stop it from selling the common short.

Gurary I, 190 F.3d at 44; App. 24.[3] The court of appeals squarely rejected the contention that this theory provided adequate factual or legal support for a Section 10(b) and SEC Rule 10b-5 claim.

The court first noted that "this theory is not the basis of the Rule 10b-5 claim against Nu-Tech set forth in the complaint and in Gurary's affidavits, which in essence was that Nu-Tech had failed to disclose what it

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[3] The court noted that Gurary had "abandoned any other claims against Nu-Tech." *Id.* n.7.

knew of Winehouse's activities." *Id.* The court accordingly held that because Gurary had "failed to make [this] argument to the district court, [he] will not be heard to advance it here." *Id.* (citations omitted). Nonetheless, the court of appeals proceeded to examine the argument, and held that "[e]ven if the argument were properly before [the court], . . . it would lack merit." *Id.*

The court of appeals observed that the statements on which the argument were based were "in the future tense" and "were ones of intention or of a promissory nature." *Id.* The court therefore relied on a fundamental tenet of the law of securities fraud—that "[t]he failure to carry out a promise made in connection with a securities transaction is normally a breach of contract. It does not constitute fraud unless, when the promise was made, the defendant secretly intended not to perform or knew that he could not perform." *Id.* (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170 at 1176 (2d Cir. 1993)).[4] The court proceeded to note that because "there is no suggestion in the complaint or in Gurary's affidavit that Feigenbaum did not intend to do just what he promised at the times he made the statements to which Gurary now points . . . [,] the claim now advanced against Nu-Tech is

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[4] This theory—of fraudulent intention not to perform a contract to buy or sell a security—was recently sustained by this Court, as an available theory of recovery in Rule 10b-5 litigation, in *The Wharf (Holdings) Limited v. United International Holdings, Inc.*, ____ U.S. ____ , 121 S.Ct. 1776, 149 L.Ed. 2d 845 (2001). There is, of course, no occasion to revisit it here.

fundamentally flawed . . . [and] was properly dismissed . . . ." *Id.*

After affirming the dismissal of the only claims against Nu-Tech that Gurary had pressed in the court of appeals, the court of appeals proceeded to examine the Rule 10b-5 claims that Gurary pressed against the Winehouse group, Nu-Tech's co-defendants. As noted above, these were generalized claims of a market manipulation accomplished through a short-selling scheme. The court of appeals' disposition of these claims was relevant to *Gurary II*, the appeal limited to the sanctions issues, and is relevant to the issues presented by the petition here, because Gurary originally pressed such theories and claims against Nu-Tech as well in the district court, alleging a violation of Rule 10b-5 by reason of Nu-Tech's supposed knowledge of and failure to disclose the manipulative scheme. But if the underlying scheme did not amount to a Rule 10b-5 claim, the failure to disclose it, even assuming any duty to do so, likewise did not amount to such a claim. The sufficiency *vel non* of those theories were therefore pertinent to the Rule 11 inquiry in *Gurary II*.

Turning first to Gurary's "last two purchases of Nu-Tech shares, which occurred on December 24, 1996 and February 18, 1997," the court of appeals observed that these were "readily disposed of." *Id.* at 44; App. 26. Gurary's theory as to these claims was that he made them *after* he had been fully informed of the manipulative short-selling scheme; indeed, after, according to him, Feigenbaum had confirmed the existence of Winehouse's scheme and had assured that Nu-Tech would refuse to register the common shares into which Winehouse's preferred shares were convertible,

"thus preventing [Winehouse] from covering his short position . . . and thereby perhaps deterring further short selling." *Id.* at 45; App. 26.

The court of appeals noted that "[i]n consequence, Gurary made each of these purchases in the belief that the prices he paid reflected Winehouse's allegedly manipulative activities." *Id.*; App. 26. As a result, these claims were properly dismissed because Gurary failed to plead and prove either that he was deceived, or that he relied—he failed to plead or prove that his trades were made "in ignorance of the fact that the price was affected by the alleged manipulation." *Id.*; App. 27. The claims were thus lacking in two of the foundation elements of a Rule 10b-5 claim, deception and reliance.

With respect to Gurary's initial purchases of Nu-Tech shares, on October 31, 1996, and November 6, 1996, which the court of appeals addressed next, the court similarly held that these claims were fundamentally deficient under the Securities Exchange Act of 1934. Because Gurary's own theory was that the alleged manipulation began *after* November 6, 1996 (the earliest date on which Winehouse and others acquired the convertible preferred), "any deception inherent in the execution of a manipulative scheme beginning on or after November 6 was not 'in connection with' [Gurary's] purchase on October 31." *Id.;* App. 28 (citing *Samuel M. Feinberg Testamentary Trust v. Carter*, 652 F. Supp. 1066, 1080 (S.D.N.Y. 1987)). Thus, that claim was properly dismissed.

The claim relating to the November 6 purchase fared no better. It was likewise flawed, "as the very fact that Gurary was a buyer in a market allegedly depressed

by a manipulative scheme is an insurmountable obstacle to his claim based on that purchase." *Id.* at 45-46; App. 29. As the court of appeals held, "[w]here, as here, a buyer pays less for a security by reason of a defendant's fraud or manipulation, there is no excess of price over value, so the buyer may not recover." *Id.* at 46; App. 30. As the court declared, "that is no more than a common sense application of Section 28(a) of the [Securities] Exchange Act [of 1934]. . . . " *Id.*

Finally, having affirmed that court's dismissal of the complaint in all respects, the court of appeals turned to Nu-Tech's cross-appeal from the district court's denial of sanctions. Apparently reading the district court's first sanctions order as "merely formalistic" (App. 36), the court of appeals held that the district court had failed to make "findings regarding compliance with Rule 11(b)" and thus remanded "in order to permit it to do so." *Id.* at 47; App. 33.

D. The Decision of the Court of Appeals in *Gurary II*.

On remand to the district court after *Gurary I*, that court adhered to its prior decision denying sanctions (App. 35-38), and Nu-Tech filed a second notice of appeal to the United States Court of Appeals for the Second Circuit. By published opinion dated December 19, 2000, the court of appeals affirmed the determination of the district court with respect to sanctions in part, reversed that determination in part, and remanded once again to that court for further proceedings consistent with its reversal. *Gurary II*, 235 F.3d 792 (2d Cir. 2001); App. 39-65. The gravamen of the court of appeals' holding was that two of Gurary's claims in his complaint, predicated

on two of the four securities trades that were at issue in the case, had violated Rule 11(b).

The court of appeals first noted that Congress had enacted the PSLRA in part to give "teeth" to Rule 11, and pointed to its recent decision in *Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157, 166-67 (2d Cir. 1999), where it had observed that Congress recognized "the need to reduce significantly the filing of meritless securities lawsuits" and placed added emphasis on the sanctions sections of the PSLRA because "[e]xisting Rule 11 ha[d] not deterred abusive securities litigation." *Gurary II*, 235 F.3d at 797; App. 49. Quoting 15 U.S.C. § 78u-4(c)(3)(A)(ii), the court explained that "[i]f a court finds a Rule 11 violation, 'a rebuttable presumption [arises] that the appropriate sanction for a complaint that substantially fails to comply with Rule 11(b) "is an award to the opposing party of the reasonable attorneys' fees and other expenses incurred in the action."'" *Id.*; App. 49-50.[5]

Turning to the four claims that were urged in this case to have violated Rule 11(b), the court of appeals agreed with Nu-Tech's contention, with respect to those claims arising from Gurary's securities purchases of October 31, 1996, and November 6, 1996, that Gurary had "'failed to satisfy fundamental and threshold

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[5] The court noted that where a party against whom sanctions will be imposed rebuts the presumption by providing sufficient evidence under 15 U.S.C. § 78u-4(c)(3)(C), then the courts are to impose such sanctions as they deem appropriate. *Id.*

requirements for a Rule 10b-5 claim,'" had "'failed . . . to suggest any reason that he could have achieved "success under existing precedents,"'" and had "'failed to advance any "reasonable argument . . . to extend, modify or reverse the law as it stands."' *Id.* at 798; App. 53. The court of appeals rejected Jaroslawicz's arguments that sanctions were not warranted where the "merits" of a complaint are "arguable," and held that "sanctions therefore [are] mandatory." *Gurary II*, 235 F.3d at 799-800; App. 58.

Accordingly, the court of appeals remanded to the district court "to determine appropriate sanctions pursuant to 15 U.S.C. § 78u-4(c)(3)(A)-(C)," noting in this connection that such sanctions were to be imposed against Jaroslawicz and his firm, not against Gurary himself. *Gurary II*, 235 F.3d at 800 n.8; App. 59. Gurary (or, rather, Jaroslawicz and his firm) moved for panel reconsideration and for rehearing *en banc*, and the court of appeals denied that motion by order dated February 28, 2001. The court of appeals' mandate issued March 8, 2001. The petition for a writ of certiorari was thereafter timely filed in this Court on May 29, 2001, and docketed on June 29, 2001. While the petition for the writ was pending, the district court rejected Jaroslawicz's further arguments why sanctions should not be imposed against him, and by written decision and order dated August 1, 2001, imposed sanctions in the amount of $62,556.28. *Gurary v. Winehouse*, 97 Civ. 3803 (LLS), 2001 WL 876912 (S.D.N.Y. Aug. 2, 2001).

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the court of appeals erred by awarding sanctions for the assertion of frivolous claims does not warrant review by this Court. The court of appeals' decision in *Gurary II* was a plainly correct application of settled principles of liability and damages in the jurisprudence of Rule 10b-5, most of it emanating from this Court and not subject to serious doubt. The determination to award sanctions was based on a plainly correct reading of a clear federal statute, the Private Securities Litigation Reform Act of 1995, that raises no issues of interpretation, overbreadth, or constitutional infirmity that would warrant review in this Court. Similarly, no conflict, substantial or otherwise, among the circuit courts or with a decision of this Court is urged in the petition. Nor is there any serious departure from the accepted and usual course of judicial proceedings that would warrant this Court's attention, or any important question of federal law that should be settled by this Court. The specific reasons that support these conclusions follow below.

1. Both in affirming dismissal of Gurary's claims and in determining that sanctions should be imposed against his counsel because the complaint he had signed had "'failed to satisfy fundamental and threshold requirements for a Rule 10b-5 claim,'" had "'failed . . . to suggest any reason that he could have achieved "success under existing precedents,'" and had "'failed to advance any "reasonable argument . . . to extend, modify or reverse the law as it stands"'" (*Gurary II* at 798; App. 53), the court of appeals relied solely on settled principles of securities law.

2. The court of appeals held that the fundamental, threshold elements of a Rule 10b-5 claim, deception and reliance, were absent; that the fraud alleged was not "in connection with" Gurary's purchases of Nu-Tech shares; and that Gurary had sustained no cognizable and recoverable damages under the securities laws, that he had not alleged or proven any "excess of price over value." There is no occasion to revisit the principles on which these holdings were based, as they are a well settled part of the body of federal law. *See, e.g., Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52 (2d Cir. 1995) (to make out a claim for fraud under Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder, a plaintiff must allege that "in connection with the purchase or sale of securities, the defendant, acting with scienter, made a false material representation or omitted to disclose material information and that plaintiff's reliance on defendant's action caused [plaintiff] injury.")

3. Nor does Jaroslawicz suggest that in relying on these principles in the context of awarding Rule 11 sanctions, the court of appeals' decision brought it into conflict with any decision of this Court, or any decision of any other court of appeals. To the contrary, the law of sanctions is a relatively well settled body of law, unaffected by inter-circuit or other disharmonies. *See, e.g., Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc.*, 186 F.3d 157 (2d Cir. 1999); *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985).

4. Similarly, Jaroslawicz suggests no reason that this Court should grant the writ in order to interpret or assess Congress's directives under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 *et seq.*

(the "PSLRA"). While that act may indeed have modified former practice with respect to securities litigation, there is simply nothing about it with respect to the sanctions provisions that would require, or even argue, that this Court grant certiorari to review it. Equally, there is nothing to suggest that any district court or court of appeals has found any difficulty in applying the PSLRA, or in assessing the need for sanctions thereunder, so as to mandate review here.

5. Rejecting these traditional bases for review by certiorari, Jaroslawicz's sole argument is that this Court should correct a *factual error* that he claims was committed by the court of appeals. Even assuming that such an error merited review here (it does not), no such error was committed. The argument, in simple terms, is that Jaroslawicz never intended to plead that Nu-Tech was liable for securities fraud with respect to the securities purchases of October 31, 1996, and November 6, 1996, but only with respect to those that occurred on December 24, 1996, and February 18, 1997. He therefore contends that when the court of appeals determined that the claims predicated on the earlier two trades, but not the latter two, were sanctionable because they could not be supported in law or in fact, the court committed error.

6. In the first instance, such an error, if it was committed (it was not), is irrevocably bound up with the manner in which his pleading sought to present the claims, and with the manner in which Jaroslawicz sought to defend that pleading in the district court and the court of appeals. Thus, the error if any, was factbound, and is tied to the specifics of the matter before those courts. It does not raise any general

principle of law that is within the traditional jurisdiction or interest of this Court. Its correction (even assuming it needed any) would have no effect on any person other than Jaroslawicz. Such an error, if committed, was one that the court of appeals could easily have ascertained and corrected. That it did not do so on rehearing—after Jaroslawicz finally, and belatedly, pointed out this supposed error—necessarily forecloses further review here.

7. Moreover, Jaroslawicz would have this Court conclude that the court of appeals misread not only the complaint in this action, but all of the briefs that were before it, as well as counsel who argued before it twice. He asserts that the 10b-5 claim he himself drafted, based on the four separate securities purchases that he identified in the complaint, was in actuality intended to have been separate claims as against separate defendants, although in drafting his complaint, in opposing dismissal, in defending himself against sanctions under Rule 11(b), and in presenting his positions to the court of appeals on two plenary appeals, he failed to raise this argument. (As noted above, Jaroslawicz first raised this assertion on petition for rehearing and rehearing *en banc*.)

8. Any fair reading of the complaint discloses that Jaroslawicz had asserted a single, unitary claim arising from the four individual purchases of securities. The complaint did not separate the claims by each purchase of securities, or otherwise differentiate as to which transaction was supposedly actionable as to each defendant, and to the extent that it created ambiguity or uncertainty by reason of poor draftsmanship, that is a risk that Jaroslawicz, the author of this pleading,

necessarily bore. Jaroslawicz contends before this Court that "[n]owhere in the plaintiff's compliant (sic) did the plaintiff allege that a claim was being asserted for each of these purchases" (Petition at 6), yet a fair reading of the complaint discloses the contrary—because the pleader elected to include as operative facts the four separate securities purchases, he intended that opposing counsel understand the pleading to state claims based on each purchase. It simply does not avail Jaroslawicz now to claim that he did not mean this, not after years of proceedings based on a different common understanding.

9. Jaroslawicz contends variously that "[*Gurary I*] specifically noted that the claims against Nu-Tech were limited to the second two purchases, and that no claim was made against Nu-Tech with respect to the first two purchases" (Petition at 7); that the award of sanctions in *Gurary II* based on Gurary's earlier securities purchases is "disturbingly incongruous" because "another panel of the Second Circuit had found that '[p]laintiff's attack on the dismissal of his Rule 10b-5 claims against Nu-Tech *is limited to the claim that he was deceived in making his December 24, 1996 and February 18, 1997 purchases*" (*id.* at 10 (emphasis supplied by counsel in petition)); that *Gurary II* "held that [counsel] must pay sanctions . . . for supposedly having asserted claims that *Gurary I* recognized were not asserted against the defendant Nu-Tech" (*id.* at 11); and that the holding of the court of appeals in *Gurary II* is "contrary to what the [court of appeals] held in *Gurary I*." *Id.* at 19.

10. These contentions—that there is a fatal variance between the decision in *Gurary I* and the decision in *Gurary II*—are, however, without any merit whatsoever, and are based on a plain misreading of the decision in *Gurary I*. Thus, in noting that "[Gurary's] attack on the dismissal of his Rule 10b-5 claim against Nu-Tech is limited to the claim that he was deceived in making his December 24, 1996 and February 18, 1997 purchases" (*Gurary I*, 190 F.3d at 44; App. 24), the court of appeals was neither parsing the complaint to determine what Jaroslawicz had in fact sought to plead, nor indicating in any manner that his *claims* and pleading were limited in such a fashion. Rather, the court of appeals was merely acknowledging the fact that while in the district court Gurary and his counsel had sought to defend *all* of the claims from attack under Fed. R. Civ. P. 12(b)(6) and 56, in the court of appeals he had "limited" his arguments, and had "abandoned any other claims against Nu-Tech . . . ." *Id.* and n.7.[6]

11. In short, on appeal in *Gurary I* Gurary and his counsel failed to defend the earlier securities purchases as stating claims for relief. Instead, on the first appeal Gurary and his counsel abandoned their prior theory as to Nu-Tech (that Nu-Tech know of, but failed to disclose,

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[6] The contention that there is a fatal variance between *Gurary I* and *Gurary II* is repeated several times throughout the petition (*see, e.g.*, Petition at 10, 17), as if the court of appeals had in fact explicitly recognized the variance. It did no such thing, and the effort to make it seem as if it had done so is misleading in the extreme.

the scheme), and substituted a different one—that Nu-Tech had promised to frustrate the scheme, and did not keep its promise. But this change of theory cannot alter the original, frivolous allegations as to which the court of appeals imposed sanctions.

12. To the extent the petition argues that the court of appeals erred, that is a mere factual argument, not an assertion that there is any fundamental and important conflict in federal law that requires this Court's intervention. Stated otherwise, and even assuming that the court of appeals was wrong (it was not), it is axiomatic that an error in the application of a settled rule alone does not bring this case within the ambit of Supreme Court Rule 10. As that rule states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see Hubbard v. United States*, 514 U.S. 695, 720 (1995) ("A high degree of selectivity is . . . enjoined upon us in exercising our certiorari jurisdiction . . . . [O]rdinarily a court of appeals decision interpreting one of our precedents—even one deemed to be arguably inconsistent with it—will not be reviewed unless it conflicts with the decision of another court of appeals.") (Rehnquist, C.J., dissenting).

13. Jaroslawicz's many assertions that the court of appeals' imposition of sanctions will have an "*in terrorem* effect" (*see, e.g.*, Petition at 11, 18) on "lawyers whose clients have valid securities fraud claims" (*id.* at 11), are equally without merit. No lawyer need fear to assert a *valid* claim. That, of course, is the clear command of the Federal Rules of Civil Procedure and of the PSLRA. Jaroslawicz, contrary to his repeated contentions, was sanctioned for asserting claims, and

repeatedly defending them, that were patently *invalid*—that had no basis in law or in fact. The two decisions of the court of appeals here admit of no other interpretation.

14. Jaroslawicz's *post hoc* rewriting of history fails to assist his arguments. Thus, his petition seeks at length to explain why he included the "details" of his client's securities purchases, yet did not make sanctionable allegations of fact and law. According to Jaroslawicz now, this was "by way of background," and "to demonstrate that [Gurary] was a legitimate investor whose interest in [Nu-Tech] pre-dated the fraud, rather than the sort of faux (sic) investor" whose "speculative" securities purchases for litigation purposes the PSLRA was designed to intended to discourage. Petition at 13. This wholesale rewriting of history fails to account for two salient facts—the utter absence in the complaint of any indication that this was the reason for the inclusion of these facts, and the context of the pleading, which indicated, exactly to the contrary of these contentions, that these facts were included because they were operative facts giving rise to purported claims.[7]

15. Finally, *Gurary II*, while it plainly stands as a warning against the filing of frivolous claims, does not in

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[7] Nor need lawyers avoid providing "detail" and "background information" in their complaints for fear of being sanctioned. The pleading standards are well settled ones. *See* Fed. R. Civ. P. 8, 9(b). Those standards are not in issue in this case, and were not at issue before the court of appeals.

any manner indicate that securities practitioners should hesitate to file meritorious claims because their pleadings will be "microscopically scrutinized" in order to "find 'frivolous' statements." (Petition at 19) Securities pleadings will be held to the same standard to which they have always been held, pursuant to the adjectival prescriptions of the Federal Rules of Civil Procedure and the substantive admonitions of the securities laws. Nothing in this case alters this regime. The case stands as fair warning that securities practitioners must scrutinize their pleadings so that the Rule 11 warranty that allegations are "well grounded" in fact and law is a meaningful one. Complaints that fail to satisfy this requirement, and practitioners who fail to advance reasons that their pleadings could achieve success under existing precedents or reasonable arguments to extend, modify or reverse the law, are properly subject to that warning.

16. In short, there is no conflict on an important matter between any decision of this Court and the decisions of the court of appeals here. There is no conflict on an important matter between decisions of the courts of appeals that is raised by this petition. And there is no challenge to any action of the court of appeals in the nature of an assertion that they have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Sup. Ct. R. 10(a). The petition at best seeks a further level of appellate factual review that is unavailable in this Court; all proper and traditional bases for the exercise of this Court's certiorari jurisdiction are lacking.

CONCLUSION

For the reasons given above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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